

MAY 18 1990

No. 89-1555

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Nebraska

PETITIONER'S REPLY BRIEF

RICHARD A. ALLEN

Counsel of Record

ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
202/298-8660

RICHARD L. SPANGLER, JR.

WOODS & AITKEN

1500 American Charter Center
206 South 13th Street
Lincoln, Nebraska 68508
404/474-0321

TABLE OF CITATIONS

Cases:	Page
<i>ANR Pipeline Company v. Michigan Public Service Commission</i> , 608 F. Supp. 43 (W.D. Mich. 1984)	2
<i>Boston Stock Exchange v. State Tax Commission</i> , 429 U.S. 318 (1977)	3
<i>Continental Illinois Corp. v. Lewis</i> , 838 F.2d 457 (11th Cir. 1988), vacated on other grounds, 110 S.Ct. 1249, 108 L.Ed.2d. 400 (1990)	2
<i>Kennecott Corp. v. Smith</i> , 637 F.2d 181 (3rd Cir. 1980)	1
<i>Lipson v. Snyder</i> , 701 F. Supp. 541 (E.D. Pa. 1988)	2
<i>Maher v. Gagne</i> , 448 U.S. 122 (1980)	5
<i>Maine v. Thiboutot</i> , 448 U.S. 1 (1980)	4
<i>Martin-Marietta Corp. v. Bendix Corp.</i> , 690 F.2d 558 (6th Cir. 1982)	1
<i>Morgan v. Virginia</i> , 328 U.S. 373 (1946)	3
<i>Nippert v. Richmond</i> , 327 U.S. 416 (1946)	6
<i>Union Pacific R.R. v. Mason City & F.D.R.R.</i> , 199 U.S. 160 (1905)	2
<i>United States v. Guest</i> , 383 U.S. 745 (1966)	3
<i>Will v. Michigan Department of State Police</i> , 109 S.Ct. 2304 (1989)	5
<i>Woods v. Interstate Realty Co.</i> , 337 U.S. 535 (1949)	2
 Statutes and Other Materials:	
42 U.S.C. § 1983	2,3,4,5
42 U.S.C. § 1988	2,4,5,6
R. Stern, E. Gressman, & S. Shapiro, <i>Supreme Court Practice</i> (6th ed. 1986)	1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-1555

MARK E. DENNIS,

Petitioner,

v.

MARGARET L. HIGGINS, DIRECTOR,
NEBRASKA DEPARTMENT OF MOTOR VEHICLES, et al.,
Respondents.

**On Petition for a Writ of Certiorari
to the Supreme Court of Nebraska**

PETITIONER'S REPLY BRIEF

Respondents' various arguments in opposition to the petition for a writ of certiorari are insubstantial.

1. Respondents contend that the conflict among the circuits and state supreme courts on the question presented is not genuine but is "mere inconsistency in dicta." (Br. in Opp. at 2, quoting R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* § 4.3 (6th ed. 1986)). Respondents base this claim mainly on the fact that two of the decisions cited by petitioner—*Kennecott Corp. v. Smith*, 637 F.2d 181 (3rd Cir. 1980), and *Martin-Marietta Corp. v. Bendix Corp.*, 690 F.2d 558 (6th Cir. 1982)—found grounds in ad-

dition to violations of the Commerce Clause for concluding that the plaintiffs had stated a cause of action under § 1983 (*id.* at 2-3).

Respondents are incorrect. The fact that the decisions of the Third and Sixth Circuits rested on grounds in addition to the Commerce Clause violations does not make the rulings with respect to the Commerce Clause *dicta*. On the contrary, it is well settled that "where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is *obiter*, but each is the judgment of the court, and of equal validity with the other." *Union Pacific R.R. v. Mason City & F.D.R.R.*, 199 U.S. 160, 166 (1905). *See also, e.g., Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949); *Lipson v. Snyder*, 701 F. Supp. 541, 544 (E.D. Pa. 1988). As such, the rulings of the courts on the Commerce Clause issue were holdings that established the law in those circuits and are binding on all courts in those circuits. *See ANR Pipeline Co. v. Michigan Public Service Commission*, 608 F. Supp. 43, 48 (W.D. Mich. 1984) (applying the holding in *Martin-Marietta Corp.*). Those holdings are and will continue to be directly in conflict with the law established in the Seventh, Eighth, Ninth and Tenth Circuits and in a number of states, and that conflict warrants this Court's review.

Nor is there any merit to respondents' suggestion (Br. in Opp. at 4) that the Eleventh Circuit's award of attorneys' fees in *Continental Illinois Corp. v. Lewis*, 838 F.2d 457, 458 (11th Cir. 1988), *vacated as moot*, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990), may not have been based on 42 U.S.C. § 1983 or on the

court of appeals' considered conclusion that 42 U.S.C. § 1983 provides a remedy for Commerce Clause violations. The Commerce Clause/Section 1983 issue and the conflicting authorities on that issue were fully briefed to the Eleventh Circuit, and as the Solicitor General pointed out in urging this Court to give plenary review to the § 1983 issue in that case, the other grounds suggested by the plaintiff as a basis for an attorney fee award were manifestly unsupportable or were clearly secondary to the Commerce Clause ground.¹

Furthermore, this is an issue that has arisen in many cases and, given the conflict among the circuits and the state courts, is one that will continue to recur until it is resolved by this Court.

2. Respondents dispute petitioner's claim that the ruling below—that the Commerce Clause does not secure personal constitutional rights—conflicts with decisions of this Court (Br. in Opp. at 7-11). Respondents, however, completely ignore the principal cases cited by petitioner, such as *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 320 n.3 (1977), which held that certain stock exchanges had standing to "assert their right under the Commerce Clause to engage in interstate commerce free of discriminatory taxes on their business . . .," and *Morgan v. Virginia*, 328 U.S. 373 (1946), which upheld the right of an interstate bus passenger under the Commerce Clause to travel on unsegregated buses, and *United States v. Guest*, 383 U.S. 745, 757-760 (1966), recognizing that individuals have a "constitutional right to travel from one State to another"

¹ Brief for the United States As Amicus Curiae at 20-21, *Lewis v. Continental Bank Corp.*, Supreme Court No. 87-1955.

based on the Commerce Clause. These rulings were not *dicta*, but were central holdings of the decisions. Presumably recognizing that the decision below cannot be reconciled with these decisions, respondents have simply ignored them.

3. Respondents also argue that the question presented is not important because the Commerce Clause claims are "economic in nature and involve disputes between business interests and government" (Br. in Opp. at 11) and because Commerce Clause claims can be asserted judicially without 42 U.S.C. § 1983 (*id.* at 12). These arguments are meritless. First, nothing in § 1983 or its legislative history suggests that it only redresses "noneconomic" injuries, and numerous cases prove the contrary. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980) (holding that § 1983 applies to a state's erroneous withholding of Social Security benefits). Moreover, it is doubtful that injuries from constitutional violations can be readily classified as either "economic" or "noneconomic" on any principled or workable basis.

Second, the fact that Commerce Clause claims have been and can be asserted in court without § 1983 is plainly irrelevant to the issue of whether Commerce Clause violations establish a cause of action under § 1983. Violations of many other constitutional and federal statutory provisions by states or under color of state law have also been asserted in court independently of § 1983, but that does not mean that § 1983 does not also provide a remedy for them or that attorneys' fees are not available under § 1988. Indeed, this Court has held that attorneys' fees are available under § 1988 even if the court granted relief for the violation on grounds other than § 1983 if relief

could have been granted under § 1983. *Maher v. Gagne*, 448 U.S. 122, 132 n.15 (1980).

4. Finally, there is no basis whatever for respondents' claim that recognizing remedies under §§ 1983 and 1988 for Commerce Clause violations "would be extremely detrimental to state interests" and "would impose a serious financial burden on state officials and would undoubtedly have a chilling effect on their willingness to engage in legitimate and needed activities in areas such as taxation and the regulation of business activity." (Br. in Opp. at 11, 13). Recognizing a cause of action under § 1983 for Commerce Clause violations would not expose states or state treasuries to liability for damages, because this Court held in *Will v. Michigan Department of State Police*, 109 S.Ct. 2304 (1989), that neither states nor state officials sued in their official capacities for money damages are "persons" that are subject to suit under § 1983. Nor would state officials who enforce state laws in good faith be exposed to personal liability for damages, and petitioner has not claimed such damages against respondents in this case. The only effects of recognizing a cause of action under § 1983 would be to require states who violated the Commerce Clause to pay the reasonable attorneys' fees and litigation expenses of prevailing litigants and to expose state officials who violate the Commerce Clause willfully and in bad faith to personal liability for the resulting harm.

These consequences do not threaten any serious financial harm to states or impose an unwarranted burden on state officials. On the contrary, in many cases they may serve as the only meaningful deterrent and sanction against the natural proclivity of states to

enact taxes and laws that disproportionately impact interstate commerce or out-of-state interests. *See Nipper v. Richmond*, 327 U.S. 416, 434-435 (1946). In this case, for example, Nebraska collected millions of dollars in taxes pursuant to the challenged tax before it was struck down. Because its courts refused to escrow the tax collections or permit a class action for refunds, the State will probably retain most of that money. If petitioner's claims for attorneys' fees and costs under § 1988 are also denied, the consequences to the State of its unconstitutional action will have been all profit and no cost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD A. ALLEN
Counsel of Record
ZUCKERT, SCOUTT & RASENBERGER
888 Seventeenth Street, N.W.
Suite 600
Washington, D.C. 20006
202/298-8660

RICHARD L. SPANGLER, JR.
WOODS & AITKEN
1500 American Charter Center
206 South 13th Street
Lincoln, Nebraska 68508
402/474-0321

May 18, 1990